



June 1, 2000

Mr. John Steiner
Division Chief
Law Department
City of Austin
P.O. Box 1546
Austin, Texas 78767-1546

OR2000-2140

Dear Mr. Steiner:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID # 136364.

The City of Austin (the "city") received a request for information relating to deaths in Austin Police Department custody during the years 1998, 1999, and 2000, including every press release from the police department's public information or a similar office and other documents, including autopsies, witness statements, medical reports, and offense reports. You inform us that some of the requested records are the subject of Open Records Letter No. 99-3133 (1999) and that the city will handle requests for such records in accordance with that ruling. You also state that much of the requested information is in the personnel files of police officers and that with regard to that information, the requestor will be referred to the director of the Civil Service Commission pursuant to section 143.089 of the Local Government Code.¹ You further inform us that other responsive information, including press

¹We note that in a civil service municipality, section 143.089 of the Local Government Code contemplates the creation and maintenance of two different types of personnel files by a police department. One *must* be maintained as part of a police officer's civil service file, and the other *may* be maintained by the department for its own internal use. Local Gov't Code § 143.089(a), (g). The civil service file maintained under section 143.089(a) must contain certain specified items, including commendations, periodic evaluations by the officer's supervisor, and documents relating to misconduct in any instance where the police department took disciplinary action against an officer. See Local Gov't Code § 143.089(a). The records encompassed by section 143.089(a) are subject to public disclosure under the Public Information Act unless some exception to disclosure is applicable. See Local Gov't Code § 143.089(f); *City of San Antonio v. Texas Att'y Gen'l*, 851 S.W.2d 946, 948-49 (Tex. App.--Austin 1993, writ denied); Open Records Decision No. 562 at 6 (1990). Subsection (g) authorizes, but does not require, the police department to maintain, for its own use, a separate and independent internal departmental personnel file relating to a police officer. Subsection (g) provides that "[t]he [police] department shall refer to the [civil service] director or the director's designee a person or agency that requests information that is maintained in the . . . police officer's personnel file." Local Gov't Code § 143.089(g).

releases and several closed investigation files, will be released to the requestor. You assert that other information sought by the requestor is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.108, 552.117, 552.119, 552.127, and 552.130 of the Government Code. You have submitted representative samples of the requested information that the city seeks to withhold.² We have considered the exceptions you claim and have reviewed the information you submitted.

We initially note that the submitted information includes autopsy records that are subject to disclosure under other law.³ Section 11, article 49.25 of the Code of Criminal Procedure provides as follows:

The medical examiner shall keep full and complete records properly indexed, giving the name if known of every person whose death is investigated, the place where the body was found, the date, the cause and manner of death, and shall issue a death certificate. The full report and detailed findings of the autopsy, if any, shall be a part of the record. Copies of all records shall promptly be delivered to the proper district, county, or criminal district attorney in any case where further investigation is advisable. The records are subject to required public disclosure in accordance with Chapter 552, Government Code, except that a photograph or x-ray of a body taken during an autopsy is excepted from required public disclosure in accordance with Chapter 552, Government Code, but is subject to disclosure:

- (1) under a subpoena or authority of other law; or
- (2) if the photograph or x-ray is of the body of a person who died while in the custody of law enforcement.

Code Crim. Proc. art. 49.25, § 11. Thus, autopsy records included in the requested information are public and must be disclosed.

The submitted records also include a grand jury subpoena and certain records that appear to have been obtained pursuant to the subpoena. Article 20.02 of the Code of Criminal Procedure provides for the secrecy of grand jury proceedings. This office has concluded that grand juries are not governmental bodies that are subject to the Public Information Act, so

²This letter ruling assumes that the representative samples of requested information that you submitted are truly representative of the requested information as a whole. See Gov't Code § 552.301(e)(1)(D); Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988). This letter ruling does not reach, and therefore does not authorize the city to withhold, any other requested information that differs substantially from the information that you submitted to this office. *Id.*

³As a general rule, statutes other than the Public Information Act that expressly make certain information public prevail over exceptions to required public disclosure under the Act. See Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989).

that records within the actual or constructive possession of a grand jury are not subject to disclosure under the Act. *See* Open Records Decision No. 513 (1988). When an individual or entity acts at the direction of the grand jury as its agent, information prepared or collected by the agent is within the grand jury's constructive possession and is not subject to the Act. *See* ORD 513 at 3. Information that is not so held or maintained is subject to the Act and may be withheld only if a specific exception to disclosure is applicable. *Id.* Thus, to the extent that any of the submitted information is in the custody of the police department as agent of the grand jury, such information is in the constructive possession of the grand jury and therefore not subject to disclosure under the Act.

We note, however, that the submitted grand jury subpoena was filed with a court. Certain judicial records that are not subject to the Act may be open to the public under other sources of law. *See Star-Telegram, Inc. v. Walker*, 834 S.W.2d 54 (Tex. 1992) (documents filed with a court generally are considered to be public); Attorney General Opinion DM-166 at 3 (1992) (public has general right to inspect and copy judicial records); Open Records Decision No. 25 at 3 (1974) (addressing public's right to inspect records of a justice of the peace).

In the event that the subpoena is not in the custody of the police department as agent of the grand jury, it is subject to disclosure under section 552.022 of the Act. Section 552.022(a) provides in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

...

(17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(17). Thus, as the submitted subpoena also is a matter of public court record, it is subject to required public disclosure under section 552.022(a)(17), unless it is held by the police department as agent of the grand jury. Additionally, the submitted records contain other documents, not related to a grand jury, that also have been filed with a court. These records also must be released pursuant to section 552.022(a)(17).

Section 552.022(a) also requires the disclosure, unless other law expressly makes it confidential, of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]" Gov't Code § 552.022(a)(1). Thus, any completed offense, arrest or other police report that is not subject to your claims under section 552.101 in conjunction with common law privacy or section 552.108 must be released pursuant to section 552.022(a)(1).

Turning to the exceptions that you raise, we begin with your claim that the submitted records include criminal history record information that is protected from disclosure under section 552.101 of the Act. Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. We agree that the city must withhold all criminal history record information (“CHRI”) obtained from the National Crime Information Center (“NCIC”) or the Texas Crime Information Center (“TCIC”). The dissemination of CHRI obtained from the NCIC network is limited by federal law. *See* 28 C.F.R. § 20.1; Open Records Decision No. 565 at 10-12 (1990). The federal regulations allow each state to follow its own individual law with respect to CHRI that it generates. *See* ORD 565 at 10-12. Sections 411.083(b)(1) and 411.089(a) of the Government Code authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *See* Gov’t Code § 411.089(b)(1). Thus, any CHRI generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations. Further, any CHRI obtained from the Texas Department of Public Safety or any other criminal justice agency must be withheld as provided by subchapter F of chapter 411 of the Government Code. Therefore, any criminal history record information obtained from the NCIC or the TCIC must be withheld pursuant to section 552.101 of the Act in conjunction with federal law and chapter 411 of the Government Code.

You also claim that a portion of the submitted information is excepted from disclosure under section 552.101 in conjunction with common law privacy. *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). When a governmental body locally compiles or summarizes criminal history information pertaining to a particular individual, the compiled or summarized information takes on a character that implicates the individual’s right of privacy in a manner that the same information in an uncompiled state does not. *See United States Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989). Thus, section 552.101 requires a law enforcement agency to withhold such locally compiled criminal history information that treats an individual as a suspect, arrestee, or defendant, because the individual’s common law right of privacy has been implicated. *Id.*; *see also* Open Records Decision No. 616 at 2-3 (1993). Accordingly, the city must withhold, under section 552.101 in conjunction with common law privacy, any criminal history information that it has compiled concerning a living individual identified as a suspect, arrestee, or defendant. We note, however, that the common law right of privacy is personal to an individual and lapses at his or her death. *See* Attorney General Opinion H-917 at 3-4 (1976); Open Records Decision No. 272 at 1 (1981). Accordingly, any locally compiled criminal history information that relates to a deceased individual is not excepted from disclosure under section 552.101 and must be released, unless another exception to disclosure that the city has raised is applicable to all or part of that information.

The submitted records also contain information relating to 9-1-1 calls that may be confidential under section 552.101 in conjunction with provisions of the Health and Safety

Code.⁴ Section 771.061(a) of the Health and Safety Code makes confidential certain information that telephone companies and the United States Postal Service furnish to a governmental entity that provides computerized 9-1-1 emergency services. *See generally* Open Records Decision No. 661 (1999). Sections 772.118, 772.218, and 772.318 of the Health and Safety Code make confidential the originating telephone numbers and addresses of 9-1-1 callers that are furnished by a 9-1-1 service supplier. *See* Open Records Decision No. 649 (1996). If one of these provisions is applicable to the city, you must withhold all such confidential information that is contained in responsive records relating to 9-1-1 calls. The remaining information in these records is not confidential under the cited provisions of the Health and Safety Code.

You also point out that the requested information includes custodial death reports and medical records. Article 49.18(b) of the Code of Criminal Procedure requires law enforcement agencies to complete custodial death reports and file them with the attorney general, who is required to make the report, except for any portion that the attorney general determines is privileged, available to any interested party. This office has held that under article 49.18(b) in conjunction with a directive issued by the office of the attorney general, section one of a custodial death report filed with this office is public information. All remaining portions of the report, including all attachments, are deemed privileged and must be withheld from the public. *See* Open Records Decision No. 521 (1989).

The disclosure of medical records is governed by the Medical Practice Act (the "MPA"), which is codified at subtitle B of title 3 of the Occupations Code. Section 159.002 of the Occupations Code provides in relevant part:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter . . . may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(b), (c). The MPA includes provisions that govern the disclosure of information that it encompasses. *See* Occ. Code §§ 159.003, 159.004, 159.005, 159.006. In construing the predecessor statute, this office held that in governing access to a specific subset of information, the MPA prevails over the more general provisions of the Public

⁴Statutory confidentiality under section 552.101 generally requires express language that makes certain information confidential or provides that it shall not be released to the public. *See* Open Records Decision No. 478 at 2 (1987).

Information Act.⁵ Therefore, medical records contained in the submitted information may be released only in accordance with the Medical Practice Act.

You also assert that requested information relating to three pending cases is excepted from disclosure under section 552.108 of the Act. Section 552.108, the “law enforcement exception,” provides in relevant part that “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if ... release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov’t Code § 552.108(a)(1). A governmental body that claims an exception to public disclosure under section 552.108 must reasonably explain, if the responsive information does not do so on its face, how and why section 552.108 is applicable. *See Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986). In this instance, you inform us that the submitted information includes records relating to three cases that are being reviewed by the Travis County District Attorney’s Office and may be submitted to the grand jury. You have submitted correspondence from the district attorney’s office that confirms your representations. Based on your representations and our review of that correspondence and the submitted information, we conclude that you have demonstrated that release of the records that are being reviewed by the district attorney would interfere with the detection, investigation, or prosecution of crime. *See Gov’t Code § 552.108(a)(1); Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177, 184-85 (Tex. Civ. App.--Houston [14th Dist.]1975), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases); *see also* Open Records Decision Nos. 624 at 5-6 (1994), 372 at 4 (1983) (stating that where an incident allegedly involving criminal conduct remains subject to investigation or prosecution, the law enforcement exception to disclosure may be invoked by any proper custodian of related information).

We note, however, that section 552.108(c) does not except from disclosure “basic information about an arrested person, an arrest, or a crime.” Gov’t Code § 552.108(c). Section 552.108(c) requires the city to release the type of information that is considered to be basic front-page offense and arrest report information, including a detailed description of that offense, even if that information is not literally located on the front page of the corresponding police report. *See Houston Chronicle*, 531 S.W.2d at 186-87; Open Records Decision No. 127 at 3-4 (1976) (summarizing the types of information deemed public by *Houston Chronicle*). You indicate that the city will release “first-page” information to the requestor in accordance with section 552.108(c). Accordingly, the city may withhold, under section 552.108(a)(1), the rest of the information that is being reviewed by the district attorney.

⁵See Open Records Decision No. 598 (1991). The Seventy-sixth Legislature repealed the predecessor statute, article 4495b of Vernon’s Texas Civil Statutes, in enacting the Occupations Code. As the enacting legislation was a non-substantive codification, interpretations of the predecessor statute retain their relevance. *See* Act of May 13, 1999, 76th Leg., R.S., ch. 388, §§ 6, 7, 1999 Tex. Gen. Laws 1431, 2439-40.

Lastly, we address your claims under sections 552.117, 552.119, and 552.130 of the Act. Section 552.117 excepts from disclosure the home address, home telephone number, or social security number of a peace officer, or information that reveals whether a peace officer has family members, regardless of whether the peace officer has complied with section 552.024 of the Act. *See* Gov't Code § 552.117(2). Section 552.117 also excepts from disclosure the home address, home telephone number, or social security number of an employee of a governmental body, or information that reveals whether the employee has family members, if the employee has elected to not allow public access to this information in accordance with section 552.024 of the Act. *See* Gov't Code §§ 552.117(1), 552.024(a); *see also* Open Records Decision Nos. 622 (1994), 530 (1989), 455 (1987).⁶

Section 552.119 excepts from disclosure "[a] photograph that depicts a peace officer as defined by Article 2.12, Code of Criminal Procedure . . . the release of which would endanger the life or physical safety of the officer." Gov't Code § 552.119(a). This office has held that a claim under section 552.119 does not require a threshold showing that release of a photograph would endanger the officer depicted. *See* Open Records Decision No. 502 (1988).

Section 552.130 of the Act governs the release and use of motor vehicle record information. Section 552.130 provides in relevant part:

(a) Information is excepted from [required public disclosure] if the information relates to:

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state;

(2) a motor vehicle title or registration issued by an agency of this state; or

⁶We also note that the submitted records contain at least one social security number not subject to section 552.117 that could be confidential under section 552.101 of the Act in conjunction with federal law. A social security number is excepted from disclosure under section 552.101 in conjunction with 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(vii)(I), *if it was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990*. *See* Open Records Decision No. 622 at 2-4 (1994). It is not apparent to this office that any social security number contained in the submitted records is confidential under section 405(c)(2)(C)(vii)(I) of the federal law. You have cited no law, nor are we aware of any law, enacted on or after October 1, 1990, that authorizes the city to obtain or maintain a social security number. Therefore, we have no basis for concluding that any social security number in the submitted records was obtained or is maintained pursuant to such a statute and is therefore confidential under the federal law. We caution you, however, that section 552.352 of the Act imposes criminal penalties for the release of confidential information. Therefore, prior to releasing a social security number, the city should ensure that the number was not obtained and is not maintained pursuant to any provision of law enacted on or after October 1, 1990.

(3) a personal identification document issued by an agency of this state or a local agency authorized to issue an identification document.

Gov't Code § 552.130(a). Thus, the city must withhold from any responsive records that are not otherwise excepted from disclosure all driver's license, license plate, vehicle identification and personal identification numbers in accordance with section 552.130.

In summary, responsive autopsy records and portions of custodial death reports are subject to disclosure under other law. Any information that the city holds as agent of the grand jury is not subject to the Act. Any information subject to the Act that also is contained in a public court record is subject to disclosure in accordance with section 552.022(a)(17) of the Act. Completed police reports may be subject to release under section 552.022(a)(1) of the Act. Criminal history record information obtained from the NCIC or TCIC networks is confidential under section 552.101 of the Act and must be withheld. Other locally compiled criminal history information that concerns a living suspect, arrestee, or defendant also is confidential under section 552.101. Information relating to 9-1-1 calls may be confidential under section 552.101 in conjunction with provisions of the Health and Safety Code. The disclosure of medical records is governed by the Medical Practice Act, subtitle B of title 3 of the Occupations Code. Investigation files that are being reviewed by the district attorney for potential submission to the grand jury are excepted from disclosure under section 552.108(a)(1) of the Act. Home addresses, telephone numbers, social security numbers, and family member information pertaining to a peace officer or to an employee of a governmental body are or may be excepted under section 552.117. Other social security number information may be confidential under section 552.101 in conjunction with federal law. Photographs of police officers are excepted from disclosure under section 552.119. Motor vehicle record information must be withheld in accordance with section 552.130. As we are able to resolve this matter under sections 552.101, 552.108, 552.117, 552.119, and 552.130 of the Act, we need not consider the city's claims under sections 552.103, 552.107, and 552.127. This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

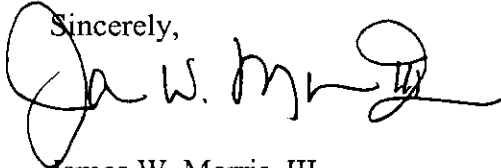
This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "J.W. Morris, III". The signature is fluid and cursive, with a large loop at the beginning and end.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/ljp

Ref: ID# 136364

Encl. Submitted documents

cc: Ms. Ann del Llano
Sunshine Project Steering Committee
P.O. Box 2013-259
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(w/o enclosures)